85-455

Supreme Court, U.S.
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No. 85—

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

POLO FASHIONS, INC.,

Petitioner,

v.

STOCK BUYERS INTERNATIONAL, INC., COLUMBUS BUSINESS SYSTEMS, INC., EUGENE SERGIO, and MORTON LADOWITZ,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred by exercising its supervisory powers to prohibit district courts from ever appointing counsel for an interested party to prosecute criminal contempt proceedings pursuant to Fed. R. Crim. P. 42(b)?

2. Whether the Court of Appeals erred by exercising its supervisory powers to reverse the convictions below absent a finding of prejudice to the defendants?

PARTIES TO THE PROCEEDINGS

Petitioner Polo Fashions, Inc.[1] was the appellee below.

The appellants below (respondents in this Court) were Stock Buyers International, Inc., Columbus Business Systems, Inc., Eugene Sergio, and Morton Ladowitz.[2]

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[1] A listing of parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates of Polo Fashions, Inc. pursuant to Rule 28.1 is printed as Appendix I to this petition.

[2] The caption of the opinion of the Court of Appeals for the Sixth Circuit of which review is sought reflects the involvement of certain third-party defendants at the trial level. Such third-party defendants were not parties to the appeal to the Sixth Circuit.

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OPINION BELOW

The decision of the Court of Appeals for the Sixth Circuit of which review is sought was issued on April 26, 1985. The opinion is reported at 760 F.2d 698, and is printed as Appendix A to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on April 26, 1985. Petitioner's timely petition for rehearing *en banc* was denied on June 17, 1985 (Appendix B); respondents' timely petition for rehearing was denied on June 19, 1985 (Appendix C). On August 14, 1985, the Court (O'Connor, J.) extended petitioner's time to file this petition for certiorari to and including September 17, 1985 (Appendix F). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves the following statutory provision, the text of which is printed as Appendix G to this petition:

Rule 42(b), Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

Introduction

This case raises two significant questions: first, whether a court of appeals may, pursuant to its supervisory powers, prohibit district courts within its jurisdiction from vindicating their authority and enforcing their civil decrees by appointing opposing counsel in an underlying civil action to prosecute criminal contempt proceedings pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure ("Rule 42(b)"); and second, whether a court of appeals may, pursuant to its supervisory powers, reverse convictions on this ground without first finding prejudice to defendants.

Petitioner Polo Fashions, Inc. ("Polo") submits that, by answering both questions in the affirmative, the Sixth Circuit Court of Appeals has established a rule that conflicts directly with (i) decisions in other circuits, (ii) Rule 42(b), and (iii) settled precedents of this Court. Because of these conflicts, and because the rule established by the Sixth Circuit severely restricts the federal courts' vitally important ability to enforce their own decrees, Polo respectfully submits that a writ of certiorari should issue.

The Proceedings Below

On January 21, 1982, Polo filed suit in the United States District Court for the Southern District of Ohio, alleging that respondents Stock Buyers International, Inc. ("Stock Buyers"), Columbus Business Systems, Inc. ("CBS"), and Eugene B. Sergio ("Sergio") were engaged in counterfeiting activities that infringed Polo's registered trademarks. On February 3, 1982, the District Court entered an agreed preliminary injunction order (the "Agreed Order") in which Sergio, Stock Buyers, and CBS consented, *inter alia*, not to sell any more counterfeit Polo garments.

On August 9, 1983, Polo moved the District Court, pursuant to Rule 42(b), to issue criminal contempt citations

against the three above-named respondents and respondent Morton Ladowitz (collectively, "the defendants"), alleging that the defendants had willfully violated the terms of the Agreed Order. Polo also requested that its attorneys be appointed by the District Court to prosecute the criminal contempt charges.[3]

On August 24, 1983, the District Court entered an order (the "Rule 42(b) Order") in which it found probable cause to believe that the defendants had willfully violated the Agreed Order, and appointed Polo's counsel to prosecute them for criminal contempt. Defendants' motion to vacate the Rule 42(b) Order on due process grounds because of the appointment of Polo's counsel was denied by the District Court.[4]

The criminal contempt trial began on February 21, 1984, and concluded on February 24, 1984, when the jury returned guilty verdicts against all four defendants. Polo presented overwhelming evidence that the defendants violated the Agreed Order by establishing an extensive counterfeiting operation. During the year following entry of the Agreed Order, for example, the defendants withdrew over $1,000,000 in cash from bank accounts of entities they created to pursue this criminal activity. The District Court sentenced Sergio and Ladowitz to six month terms of imprisonment and committed fines of $100,000 each. Stock Buyers and CBS also were fined $100,000 jointly.

On appeal, the Court of Appeals for the Sixth Circuit rejected defendants' arguments that the Agreed Order was too vague and that the evidence of willful violation was insufficient to support the contempt charges. *Polo Fashions, Inc. v. Stock Buyers International, Inc.*, 760 F.2d 698, 700 (6th Cir. 1985)

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[3] Jurisdiction in the District Court with respect to the contempt charges was proper under 18 U.S.C. § 401(3).

[4] The District Court's Rule 42(b) Order and its denial of the motion to vacate that Order are printed, respectively, as Appendices D and E to this petition.

(Appendix A at A-3—A-4). The Court found no due process violation or other constitutional infirmity during the trial and recognized that in *Musidor, B.V. v. Great American Screen,* 658 F.2d 60 (2d Cir. 1981), *cert. denied,* 455 U.S. 944 (1982), the Second Circuit had expressly determined that Rule 42(b) permits—and the practicalities of the situation frequently require—the federal courts to appoint counsel for the complaining party to prosecute criminal contempts. *Polo Fashions,* 760 F.2d at 701-02 (Appendix A at A-6—A-7).

Nevertheless, the Court of Appeals invoked its supervisory powers and reversed the convictions. The Court ruled on the basis of its perception that a complaining party's counsel could never adhere to the dual ethical obligations of public prosecutors in prosecuting conventional statutory violations and that such obligations are fully applicable in criminal contempt proceedings. *Id.* at 704-06 (Appendix A at A-11—A-14). The Court did not, however, suggest that Polo's counsel in fact failed to meet those obligations or that counsel's participation in the prosecution prejudiced the defendants in any way. It predicated its decision *solely* on its supervisory authority. *Id.* at 704 (Appendix A at A-12). The Court determined that all defendants subject to criminal contempt charges in the Sixth Circuit had a right—albeit of unspecified origins—to "be prosecuted by disinterested, publicly employed attorneys." *Id.*[5] Based on that holding, the Court reversed the convictions and remanded for a new trial.

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[5] The Court did permit the District Court to appoint a "disinterested attorney" if the United States Attorney should decline to prosecute upon request. It did not indicate, however, how the services of such an attorney would be obtained or how he would be compensated. *Id.* at 705 (Appendix A at A-14). *See infra* note 9 p. 7.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With Decisions Of Other Courts Of Appeals Which Have Held That Prosecution Of Criminal Contempt Proceedings By A Party Interested In The Underlying Civil Action Is Permissible.

The opinion of the Court of Appeals holds that federal courts in the Sixth Circuit can no longer vindicate their authority and enforce their decrees by appointing opposing counsel in underlying civil litigation to prosecute criminal contempt proceedings. *Polo Fashions,* 760 F.2d at 705 (Appendix A at A-7). In so holding, the decision of the Court of Appeals conflicts with decisions of the Second and Seventh Circuits.

The Court of Appeals itself candidly recognized that its holding was in conflict with the Second Circuit's decision in *Musidor, B.V. v. Great American Screen. See Polo Fashions,* 760 F.2d at 701-02 (Appendix A at A-6—A-7). In *Musidor,* the Second Circuit expressly rejected the argument, relied upon by the Court of Appeals below, that the potential conflict of interest of counsel for the opposing party in an underlying civil action would operate impermissibly as an inducement for him to act unfairly in prosecuting criminal contempt charges. *Musidor,* 658 F.2d at 64.

The Seventh Circuit has also upheld the appointment of counsel for the opposing party in civil actions to prosecute a related criminal contempt proceeding. *United States ex rel. Brown v. Lederer,* 140 F.2d 136 (7th Cir.), *cert. denied,* 322 U.S. 734 (1944).[6] The Sixth Circuit's contrary position is

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[6] In *Lederer,* the Seventh Circuit expressly rejected appellant's challenge to his criminal contempt conviction on the ground that criminal contempt proceedings should be prosecuted only by the Attorney General, United States Attorney, or their assistants. *Lederer,* 140 F.2d at 138. The Sixth Circuit sought in its opinion below to distinguish the *Lederer* opinion because it does not reflect that appointed counsel had been involved in the underlying civil action. *Polo Fashions,* 760 F.2d at 702 (Appendix A at A-7—A-8). However, court records reflect that the complaining party's counsel was in fact appointed to prosecute the contempt. A copy of the pertinent excerpt from the record in *Lederer* is printed as Appendix H to this petition.

supported by *Brotherhood of Locomotive Firemen and Enginemen v. United States,* 411 F.2d 312 (5th Cir. 1969).[7]

Criminal contempt proceedings are of critical importance in vindicating courts' authority to enforce their own orders and thus in insuring the effective administration of justice.[8] By holding, contrary to the decisions of other circuits, that federal courts cannot appoint attorneys for interested parties to prosecute criminal contempts, the Court of Appeals has fundamentally undermined the power of federal courts in the Sixth Circuit to enforce their decrees and has thereby undermined the effective administration of justice. The ability of the federal courts to police their own decrees should turn on a uniform rule of law, not on geography.

II. The Decision Below Conflicts With Rule 42(b).

In addition to the conflict with two circuits, the opinion below is in conflict with Rule 42(b), adopted and promulgated by this Court. The genesis, content, and purpose of that rule make this abundantly clear.

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[7] State courts are also sharply divided on this issue. The highest courts in Illinois, Massachusetts, and New Jersey have upheld the practice of appointing opposing counsel in underlying civil actions as criminal contempt prosecutors; courts in Minnesota, Nebraska, and West Virginia have rejected it. *Marcisz v. Marcisz,* 357 N.E.2d 477, 479 (Ill. 1976); *Katz v. Commonwealth,* 399 N.E.2d 1055, 1060 (Mass. 1979); *Department of Health v. Roselie,* 169 A.2d 153, 159 (N.J. 1961); *Peterson v. Peterson,* 153 N.W.2d 825, 830 (Minn. 1967); *Leeman v. Vocelka,* 32 N.W.2d 274, 278 (Neb. 1948); *State ex rel. Koppers Co. v. International Union of Oil, Chemical and Atomic Workers,* 298 S.E.2d 827, 830 (W. Va. 1982).

[8] As this Court long ago held:

> The power to punish for contempt is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.

Ex parte Robinson, 86 U.S. 505, 510 (1873).

The appointment of the complaining party's counsel to prosecute a criminal contempt is a "long-standing practice the validity of which, in principle, is not subject to question" and which long antedates the adoption of Rule 42(b) in 1946. *United States ex rel. Vuitton et Fils S.A. v. Karen Bags, Inc.*, 592 F. Supp. 734, 739 (S.D.N.Y. 1984), *appeal docketed*, Nos. 85-1068 and 1075-78 (2d Cir. Mar. 5, 1985). *See also Phillips Sheet & Tin Plate Co. v. Amalgamated Ass'n of Iron, Steel & Tin Workers*, 208 F. 335, 344 (S.D. Ohio 1913); *Civil and Criminal Contempt in Federal Courts*, 17 F.R.D. 167, 172 (1955).

Prior to the adoption of Rule 42(b), Judge Learned Hand recognized the desirability and appropriateness of appointing private counsel, and suggested a procedure to insure that the defendant recognized that the contempt charges he faced were criminal, notwithstanding the ambiguities raised by appointment of opposing civil counsel as prosecutor.

> [*T*]*he judge may prefer to use the attorney of* a *party, who will indeed ordinarily be his only means of information when the contempt is not in his presence. There is no reason why he should not do so, and every reason why he should;* but obviously the situation may in that event be equivocal, for the respondent will often find it hard to tell whether the prosecution is not a remedial move in the suit, undertaken on behalf of the client. This can be made plain if the judge enters an order in limine, directing the attorney to prosecute the respondent criminally on behalf of the court, and if the papers supporting the process contain a copy of this order or allege its contents correctly.

McCann v. New York Stock Exchange, 80 F.2d 211, 214 (2d Cir. 1935), *cert. denied sub nom. McCann v. Leibell*, 299 U.S. 603 (1936) (emphasis added).

Rule 42(b) was adopted to remedy the notice problem articulated in *McCann;* in fact, the Advisory Committee on Rules relied upon the *McCann* case in developing the rule. *Polo Fashions*, 760 F.2d at 701 (Appendix A at A-5—A-6); *see*

also Musidor, 658 F 2d at 64. Thus the Advisory Committee in proposing and this Court in adopting Rule 42(b) were fully aware of the policy favoring and the practice permitting appointment of private counsel articulated in *McCann.* " Rule 42 has consistently been recognized to be no more than a restatement of the law existing when the Rule was adopted." *United States v. Wilson,* 421 U.S. 309, 317 (1975). Indeed, the text of the rule itself refers to "an attorney appointed by the Court . . .." By prohibiting the appointment of opposing counsel in the underlying civil litigation to prosecute criminal contempt proceedings, the decision of the Court of Appeals contravenes this Court's implicit approval of the practice by its promulgation of Rule 42(b).

In addition, by proscribing such appointments the Court of Appeals has effectively limited criminal contempt proceedings solely to those cases which the Justice Department chooses to pursue. This constitutes a substantial and unwarranted restriction of the federal courts' contempt powers. The Justice Department has the "absolute discretion to decide whether to prosecute a case." *United States v. Nixon,* 418 U.S. 683, 693 (1974); *United States v. Cox,* 342 F.2d 167, 171 (5th Cir.), *cert. denied sub nom. Cox v. Hauberg,* 381 U.S. 935 (1965). If the Justice Department declines to prosecute, the rule enunciated by the Court of Appeals provides no mechanism for any federal court to vindicate its authority. *See United States v. McKenzie,* 735 F.2d 907 (5th Cir. 1984) (United States Attorney declined judicial request to prosecute for criminal contempt).[9] If the decision below prevails, federal courts would be left with no assurance that any contempt, no matter how egregious, would be prosecuted. Read literally, the opinion

[9] The suggestion of the Court of Appeals that, if the Justice Department declines to act, a disinterested private attorney may be appointed ignores the practicalities of the situation. As the Second Circuit noted in *Musidor,* 658 F.2d at 65:

> There is no fund out of which to pay other counsel . . . nor would it be proper that he be paid by the opposing party. This is not the kind of case for which legal aid societies or public defenders are available.

would even prohibit prosecution of contempt proceedings by government agencies, such as the Securities and Exchange Commission and the Federal Trade Commission, which have historically filled prosecutorial gaps in matters concerning their respective areas of expertise.[10] It was precisely to preserve the traditional judicial contempt power that the provisions for private prosecutions were codified in Rule 42(b). *See Musidor,* 658 F.2d at 65.[11]

III. The Decision Below Misconstrues This Court's Precedents Concerning Criminal Contempt Proceedings.

The Sixth Circuit reached its conclusion by misreading *Bloom v. Illinois,* 391 U.S. 194 (1968), to stand for the proposition that criminal contempt proceedings are essentially coterminous with traditional criminal actions and that all procedural safeguards applicable to the latter are equally applicable to the former. *Polo Fashions,* 760 F.2d at 704-05 (Appendix A at A-12—A-13). Hence, the Court of Appeals held, criminal contempt defendants are entitled to a prosecutor with precisely the same dual ethical obligations as a public prosecutor—obligations which the Court believed counsel for an interested party inherently could not satisfy.[12] That holding is a serious distortion of this Court's opinion in *Bloom* and

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[10] In *Lederer,* for example, the injunction that the contempt defendants were found to have violated had been obtained by the federal Office of Price Administration ("OPA"), and attorneys for the OPA were appointed to prosecute the contempt proceedings. *Lederer,* 140 F.2d at 137-38, Appendix H. Such a procedure would not be permitted under the rule enunciated by the Court of Appeals below.

[11] The judicial contempt power has, of course, application far beyond the area of trademark infringement presented here. The holding below would extend to all substantive areas of the law in which injunctive relief is commonly issued, including trademark, antitrust, patent, labor, civil rights, bankruptcy, and securities regulation.

[12] The Court of Appeals did not point to any ethical or other prosecutorial obligation which Polo's counsel *in fact* failed to satisfy. Moreover, it cited no support for its assumption that a defendant in a prosecution for statutory violations has a constitutional right to a "disinterested" prosecutor.

ignores the long line of decisions prior and subsequent to *Bloom* that distinguish criminal contempt proceedings from criminal prosecutions.

In *Bloom,* this Court held that the Constitution guarantees the right to a jury trial in "non-petty" criminal contempt proceedings. That is all that was presented to this Court; that is all that this Court decided. To rely upon *Bloom* for the broad proposition that criminal contempt and traditional criminal proceedings are procedurally identical is to stretch the opinion beyond recognition and to ignore prior and subsequent decisions of this Court. In fact, as this Court has made clear in opinions before and after *Bloom,* criminal contempt proceedings are *sui generis,* neither criminal nor civil within the ordinary meaning of those words. *See Myers v. United States,* 264 U.S. 95, 104-05 (1924); *Frank v. United States,* 395 U.S. 147, 151 (1969). As such, they do not require imposition of every procedural safeguard present in criminal actions.

Since *Bloom,* for example, this Court has reaffirmed the viability of the summary contempt power as an exception to the traditional criminal law principle that punishment can only follow a determination of guilt after trial or plea, *Bell v. Wolfish,* 441 U.S. 520, 535 n.17 (1979); emphasized the flexibility of the definition of "petty offense" in the contempt context as opposed to the rigidity of the definition of "petty" traditional crimes under 18 U.S.C. §1(3), *Muniz v. Hoffman,* 422 U.S. 454, 476-77 (1975); and rejected the notion that due process requires a "full-scale trial" for criminal contempt proceedings. *Taylor v. Hayes,* 418 U.S. 488, 500 (1974). Just as *Bloom* has not been held to mandate application of *every* traditional criminal procedural right to criminal contempt proceedings, so, *a fortiori,* nothing in *Bloom*—or any other decision of this Court—requires that criminal contempt proceedings be prosecuted by counsel who has interests identical in all respects to those of public prosecutors.

This, of course, is logical. Criminal contempt prosecutors do *not* represent the United States. They represent the court; and the court, not the government of the United States, is

responsible for the prosecution. *United States v. McKenzie,* 735 F.2d 907, 911-12 (5th Cir. 1984). Moreover, because the court retains supervision of criminal contempt proceedings, the prosecutor lacks most of the powers and discretion of a public prosecutor in conventional criminal actions; in contempt proceedings, these powers repose largely in the trial judge. For example, in an ordinary criminal action the public prosecutor has the power to initiate or terminate a prosecution; the court has no power either to force the government to prosecute or to prevent it from terminating a prosecution. *See United States v. Nixon,* 418 U.S. at 693; *United States v. Cox,* 342 F.2d at 171. In criminal contempt proceedings, however, this prosecutorial power does not belong to the prosecutor but rather to the court, which has full discretion to initiate or terminate a contempt prosecution. *See United States v. McKenzie,* 735 F.2d at 911.

By holding that the role of criminal contempt prosecutors is identical to that of public prosecutors in conventional criminal actions, the Sixth Circuit ignored the fundamental distinctions between these proceedings and seriously misinterpreted and misapplied this Court's opinion in *Bloom.*

IV. The Court Of Appeals' Reversal Of The Convictions Exceeded Its Supervisory Powers Under Controlling Decisions Of This Court.

This Court has repeatedly cautioned federal courts to use their supervisory powers in criminal cases to formulate procedural rules only when such exercise is necessary to remedy violations of recognized rights, preserve judicial integrity, or deter future misconduct without compromising the victim's interests. *United States v. Hasting,* 461 U.S. 499, 505-07 (1983); *United States v. Payner,* 447 U.S. 727, 734-37 (1980). None of those interests is served by the judgment below. To the contrary, as set forth above, the Court of Appeals, acting *sua sponte,* reached out to use its supervisory powers to proscribe a procedure under Rule 42(b) which has long been accepted by this Court and, implicitly, by Congress, and which has been explicitly approved by other courts as well. By doing so, the Court of Appeals exceeded its authority.

Most importantly, the Court of Appeals' reliance upon its supervisory powers to reverse the convictions below is directly contrary to this Court's recent holdings that reversals of convictions under the supervisory powers of the federal courts must be approached with caution, *United States v. Payner,* 447 U.S. at 734, and that the purposes properly served by the use of supervisory powers are not significantly implicated where the errors alleged are harmless. *United States v. Hasting,* 461 U.S. at 505-06.

In the present case, not only did the Court of Appeals specifically disclaim finding any due process violations, but it failed to identify any prejudice whatsoever suffered by the defendants. Under the circumstances presented here, the Court's reversal of the convictions pursuant to its supervisory powers simply does not comply with the standards announced by this Court in *United States v. Hasting* and *United States v. Payner.*

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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September 17, 1985

APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 84-3332

United States Court of Appeals

FOR THE SIXTH CIRCUIT

POLO FASHIONS, INC., ET AL.,
Plaintiffs-Appellees,

V.

STOCK BUYERS INTERNATIONAL, INC.; COLUMBUS BUSINESS SYSTEMS, INC.; EUGENE SERGIO and MORTON LADOWITZ,
Defendants-Appellants,

FRANK EDMUNDS, ET AL.,
Third Party Defendants.

ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed April 26, 1985

Before: LIVELY, Chief Judge; ENGEL, Circuit Judge; and PECK, Senior Circuit Judge.

LIVELY, Chief Judge. The defendants appeal from jury convictions of criminal contempt and the punishments imposed by the district court.

I.

Polo Fashions, Inc. (Polo) filed suit in the district court on January 21, 1982, alleging that Stock Buyers International, Inc. (Stock Buyers), Columbus Business Systems, Inc. (CBS), and Eugene B. Sergio were engaged in activities that infringed Polo's registered trademarks. In its complaint Polo sought injunctive relief, an accounting, costs and attorney fees. On February 3, 1982 the district court entered an agreed preliminary injunction order.

On August 9, 1983 Polo moved the district court to issue civil and criminal contempt citations against the three defendants and Morton Ladowitz, an officer, director and shareholder of Stock Buyers. Polo also requested that its attorneys be appointed to prosecute the criminal contempt charges. On August 24, 1983 the district court entered an order in which it determined that there was probable cause to believe that the defendants and Ladowitz willfully violated the terms of the agreed injunction, and that "the appointment of Polo's counsel to prosecute the criminal contempt will facilitate an expeditious resolution of these charges since Polo's counsel is fully familiar with this matter." The order, entered pursuant to Rule 42(b), Fed. R. Crim. P., appointed two New York City law firms together with Polo's counsel of record, a Columbus, Ohio attorney, to prosecute the criminal contempt charges. All appointees were attorneys for Polo.

The district court then signed and entered a statement of charges which had been prepared by Polo's counsel. The statement of charges was amended prior to hearing without objection. The defendants and Ladowitz pled not guilty to the charges and a trial date was set. (Hereafter Ladowitz is referred to as a defendant along with the three original defendants). The defendants made a motion to vacate the order appointing special counsel on the ground that appointed counsel were "too privately interested" to properly prosecute the case. The district court denied this motion, along with others filed by the defendants, but it granted the defendants' motion for trial by jury.

Trial of the contempt charges commenced on February 21, 1984 before the district judge and a jury. Two attorneys for Polo, one from Columbus and one from New York, appeared for the prosecution. No one from the office of the United States Attorney appeared in the proceedings. The jury found all four defendants guilty and the district court passed sentence on April 25, 1984. The individual defendants, Sergio and Ladowitz, were each sentenced to imprisonment for six months and fined $100,000, to be paid to Polo. The corporate defendants were jointly fined $100,000. All defendants have appealed, and we reverse for a new trial.

II.

The defendants have presented ten separate claims of reversible error. However, one assignment is dispositive. Therefore, we will not discuss those issues which are not likely to arise at a retrial or the many claims of error that are based on trial rulings which were made in the exercise of the trial judge's discretion and under different circumstances than will probably exist at a retrial. There are two claims of error other than the dispositive one which must be considered, however, as they would require dismissal rather than retrial if the court were to agree with the defendants.

A.

The defendants argue that the injunction was too vague to be the basis of a contempt action. We disagree. The preliminary injunction was sufficiently clear and specific to provide the basis for criminal contempt proceedings. It was an agreed order and none of the original defendants ever objected to its terms, claimed they were unclear or sought a clarification prior to institution of contempt proceedings. The defendants acted at their own risk by failing to seek the court's interpretation of the injunction if they had any good faith doubt as to its meaning or by failing to have it set aside or amended if

they thought it was defective. Once the injunction was entered the defendants were bound to obey it. Where, as here, the issuing court has jurisdiction, the validity of the injunction is not an issue in a criminal contempt prosecution. *Walker* v. *City of Birmingham*, 388 U.S. 307, 315-20 (1967); *United States* v. *United Mine Workers*, 330 U.S. 258, 293-94 (1947).

B.

The defendants contend that the evidence of willful violation by CBS was insufficient to support the guilty verdict and that Ladowitz was not shown to have actual knowledge of the preliminary injunction. We find the evidence of involvement by CBS in activities prohibited by the injunction fully sufficient to support the verdict. As to Ladowitz, he was an officer, director and shareholder of Stock Buyers, a party to the consent injunction. Thus, by the terms of Rule 65(d), Fed. R. Civ. P., he was bound by the order whether or not he had actual notice. Further, in her opening statement at the contempt trial one of the attorneys for the defendants stated that "these gentlemen," referring to Sergio and Ladowitz, went to their attorney and asked that he explain to them how to comply with the injunction. Therefore, the evidence of Ladowitz's knowledge of the injunction provisions was sufficient.

III.

The determinative factor relates to the appointment of opposing counsel in the civil case as sole prosecutors of the criminal contempt action. The defendants maintain that in the absence of any supervision or control by the United States Attorney's office, the prosecution of a criminal contempt action by counsel for a party in the underlying civil litigation constitutes a denial of due process. Polo responds that the practice has been approved repeatedly and that it promotes efficiency by placing the prosecution of a case in the hands of persons most familiar with the facts.

A.

The strongest support for Polo's position lies in dictum of Judge Learned Hand in *McCann* v. *New York Stock Exchange,* 80 F.2d 211 (2d Cir. 1935), *cert. denied sub nom. McCann* v. *Leibell,* 299 U.S. 603 (1936). After discussing the confusion which often arose over whether contempt proceedings were civil or criminal, Judge Hand wrote:

> Surely it should be possible to find some simple and certain test by which the character of the prosecution can be determined. We think that it is. Criminal prosecutions, that is, those which result in a punishment, vindictive as opposed to remedial, are prosecuted either by the United States or, by the court to assert its authority. The first are easily ascertainable; they will be openly prosecuted by the district attorney; it would not seem to be of consequence how they are entitled when that is true. In the second the court may proceed sua sponte without the assistance of any attorney, as in the case of disorder in the courtroom; there can be little doubt about the kind of proceeding when that is done. But the judge may prefer to use the attorney of a party, who will indeed ordinarily be his only means of information when the contempt is not in his presence. There is no reason why he should not do so, and every reason why he should; but obviously the situation may in that event be equivocal, for the respondent will often find it hard to tell whether the prosecution is not a remedial move in the suit, undertaken on behalf of the client. This can be made plain if the judge enters an order in limine, directing the attorney to prosecute the respondent criminally on behalf of the court, and if the papers supporting the process contain a copy of this order or allege its contents correctly.

Id. at 214-15. It is generally agreed that Rule 42(b), Fed. R. Crim. P., was adopted in response to the problem identified in *McCann.* See *Musidor* v. *Great American Screen,* 658 F.2d 60, 64 (2d Cir. 1981), *cert. denied,* 455 U.S. 944 (1982) ("the Advisory Committee on Rules relied upon the *McCann* case in

establishing Federal Rule of Criminal Procedure 42"). Rule 42(b) provides:

> **Rule 42. Criminal Contempt**
>
> **(b) Disposition Upon Notice and Hearing.** A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

Relying upon *McCann,* the Second Circuit has consistently approved the appointment of opposing counsel to prosecute criminal contempt actions. In *Musidor* the court held that the due process clause does not require the selection of someone from the office of the United States Attorney to prosecute criminal contempt actions, and "[t]he practicalities of the situation—when the criminal contempt occurs outside the presence of the court—require that the court be permitted to appoint counsel for the opposing party to prosecute the contempt." 658 F.2 at 65. The "practicalities" referred to are the fact that these are not the kinds of cases which legal aid societies and public defenders take on and there are no funds out of which to pay private counsel, "nor would it be proper that he be paid by the opposing party." *Id.* Ironically, this is exactly what happens when counsel already employed by an interested party is appointed—the prosecutor is paid by the opposing party.

It is clear that Rule 42(b) does not explicitly permit prosecution of a criminal contempt by the attorney for a party in the underlying proceedings. By its terms the Rule merely permits the court to give notice to a defendant by an order to show cause or an order of arrest "on application . . . of an attorney appointed by the court for that purpose. . . ." The Second Circuit acknowledged this literal limitation of Rule 42(b) in *Universal City Studios, Inc.* v. *N.Y. Broadway International Corp.*, 705 F.2d 94, 97 (2d Cir. 1983), but found a broader purpose by implication:

> Though Rule 42(b) in terms refers to the United States Attorney or an attorney appointed by the court solely for purposes of giving notice to the accused contemnor, the plain implication of the Rule is that the proceedings are to be prosecuted either by the federal prosecutor or a private attorney specially designated to do so.

Assuming this reading of Rule 42(b) is correct, it does not answer the question in our case. The fact that the Rule may be read to authorize the appointment of a private attorney to prosecute a criminal contempt action does not mean that counsel for the opposing party in underlying litigation may be appointed or, if appointed, may prosecute the action without any supervision by the office of the United States Attorney.

B.

No court of appeals, other than the Second Circuit, has held unequivocally that counsel for the opposing party may be appointed to prosecute a criminal contempt action. Cases from other circuits cited by Polo are distinguishable.

In *United States* v. *Lederer*, 140 F.2d 136, 138 (7th Cir.), *cert. denied*, 322 U.S. 734 (1944), the court stated:

> Appellant specifically objects to the court's appointing counsel, and insists that in a criminal contempt proceeding, the case against him should be in charge of the Attorney

> General or some assistant, or the United States District Attorney. In the absence of any specific statute, we think it was not only permissible but entirely appropriate that the court appoint counsel to take charge of proceedings instituted to enforce its order, and the attorneys thus appointed would be authorized to begin and carry through the contempt proceedings. The court is not required to select counsel from the staff of the United States District Attorney. McCann v. New York Stock Exchange, 2 Cir., 80 F.2d 211; Western Fruit Growers v. Gotfried, 9 Cir., 136 F.2d, 98.

Polo's reliance on *Lederer* is greatly weakened, however, by the fact that there is no indication that the two private attorneys appointed by the court were counsel for the party seeking an adjudication of contempt or had any previous connection with the case. All this case tells us is that prior to the adoption of Rule 42(b) a court could appoint private attorneys to prosecute a criminal contempt action.

Polo also cites *In re C.B.S., Inc.*, 570 F.Supp. 578 (E.D. La. 1983), *appeal dismissed for lack of jurisdiction sub nom. United States* v. *McKenzie*, 735 F.2d 907 (5th Cir. 1984). As authority for Polo's position in the present case this decision suffers from the same infirmity as *Lederer*. After C.B.S. violated a restraining order by televising a portion of a program the United States Attorney declined a request from all the judges of the Eastern District of Louisiana to prosecute the network for criminal contempt. A judge from outside the district was appointed to conduct the proceedings when all the judges of the Eastern District of Louisiana recused themselves after appointing two attorneys to prosecute C.B.S. for criminal contempt. There is no indication in the record that the attorneys who were appointed to prosecute the criminal contempt action were counsel for the parties who obtained the injunction. In fact, on appeal, the original plaintiffs were represented by their own counsel while the appeal was brought by the two appointed attorneys and the United States Attorney. *In re C.B.S., Inc.*, merely aligns the Fifth Circuit with the

Second in holding that Rule 42(b) permits the appointment of private attorneys to conduct criminal contempt proceedings as well as for the purpose of giving notice. 570 F. Supp. at 580-81. It does not consider whether the private attorneys so appointed may be counsel for the opposing party.

C.

Direct authority on the other side of the question is also scarce. In *Brotherhood of Locomotive Firemen and Enginemen* v. *United States,* 411 F.2d 312 (5th Cir. 1969), the court found many due process deficiencies in proceedings where a union was found guilty of criminal contempt. Among the errors identified by the court of appeals was the appointment of counsel for the railroads which sought the contempt adjudications as attorneys to conduct those proceedings. The court stated:

> As we look objectively at this record there is no doubt concerning the genesis of this due process deficiency. It flows directly from the fact that the governance of the whole criminal contempt proceeding was delivered into the hands of counsel for private parties, not the National Sovereign. This transcends the matter of competence, character and professional trustworthiness. Indeed, it is the highest claim on the most noble advocate which causes the problem—fidelity, unquestioned, continuing fidelity to the client. For while we would readily agree on this record that none of these distinguished counselors would have perverted a demand of the law in the prosecution of these respondents simply because it was detrimental to the interest of their railroad clients, the fact is that, continuing as they are in the related *merits,* case (note 4 *supra)* to the vigorous support of the Carriers' positions, they have a duty faithfully to assert every—the word is every—contention, refute every—the word is every—counter contention which they may legitimately and honorably do, which is disadvantageous to their carrier clients in this

> controversy. One such objective is to marshal and generate—through court orders if obtainable—pressures which will, or may, bring the Brotherhood earlier to book. To move fast, to get punitive orders which might put the Brotherwood in an awkward or disadvantageous position was therefore a desired goal on April 4. On the other hand, as prosecutors for the court,—*i. e.* the National Sovereign—there was an obligation to make sure that the respondents' rights were scrupulously preserved. No one would suggest now that in any way these fine lawyers submerged one interest over the other. But that is not the point. The point is that those conflicting claims of undivided fidelity present subtle influences on the strongest and most noble of men. The system we prize cannot tolerate the unidentifiable influence of such appeals.

411 F.2d at 319 (footnote omitted).

The defendants have cited several cases which hold that a party in the underlying civil case has no authority to participate in criminal contempt proceedings absent an appointment by the court. *E.g., In re Lahm Industries, Inc.,* 609 F.2d 567 (1st Cir. 1979); *Ramos Colon* v. *United States Attorney,* 576 F.2d 1 (1st Cir. 1978); *Kienle* v. *Jewel Tea Co.,* 222 F.2d 98 (7th Cir. 1955). However, like some of the cases cited by Polo, these decisions do not address the question in the present case. They merely confirm the fact that an appointment by the court is required for a private attorney to prosecute criminal contempt proceedings.

IV.

A.

This court appears never to have determined the propriety of appointing counsel for a party in the underlying case as sole, unsupervised prosecutor of a criminal contempt action. The contempt conviction in *TWM Manufacturing Co., Inc.* v. *Dura Corp.,* 722 F.2d 1261 (6th Cir. 1983), was reversed upon a

determination that the evidence did not support a finding of criminal contempt. There was no "testimonial hearing" on the contempt charges in *TWM Manufacturing.* The contempt proceedings were commenced by TWM filing a motion and brief with a notice for a hearing. On the hearing date, without objection, the district court proceeded to decide the contempt issue on the basis of affidavits and arguments. On appeal, Dura argued for reversal on the ground that the requirements of Rule 42(b) were not satisfied. The United States Attorney did not serve notice and the private attorney who served the notice had not been appointed by the court. This court did not reach the Rule 42(b) issue in light of its conclusion that the evidence was insufficient to support the conviction.

On at least two occasions this court has approved the practice of permitting private attorneys to assist public prosecutors in other types of criminal cases. In *Stumbo* v. *Seabold,* 704 F.2d 910 (6th Cir. 1983), a habeas corpus action, we found that a Kentucky law which permits a privately retained prosecutor to assist the public prosecutor in a criminal case does not constitute a per se violation of due process. In reaching this conclusion we noted that the Kentucky law "requires the public prosecutor to retain control over the conduct of the trial to ensure that the state's interests are protected." *Id.* at 911. *United States* v. *Denton,* 307 F.2d 336 (6th Cir.), *cert. denied,* 371 U.S. 923 (1962), was a bootlegging case in which an assistant regional counsel for the Internal Revenue Service made the opening statement for the government and questioned several witnesses. On appeal the defendant relied on the fact that the IRS attorney had not been specially appointed by the Attorney General to prosecute the action. In affirming the conviction, this court found that the trial was conducted by the United States Attorney and that the other lawyer only assisted.

B.

We conclude that it was an abuse of discretion for the district court to appoint attorneys for Polo to conduct the criminal contempt proceedings. These attorneys could assist

the United States Attorney or an assistant, but could not proceed alone. We make this determination under our supervisory authority[1] and do not decide that such a proceeding constitutes a per se due process violation. At one time criminal contempt was treated as a sui generis action, not requiring all the safeguards of traditional criminal proceedings. The development of safeguards for defendants in criminal contempt proceedings, particularly with respect to the right to trial by jury, was reviewed in *Bloom* v. *Illinois,* 391 U.S. 194 (1968). In *Bloom* the Court held that the Constitution guarantees the right to a jury trial in criminal contempt proceedings resulting in a sentence of imprisonment for two years. Writing for the Court, Justice White concluded that a defendant in a criminal contempt action has the right "not to be subjected to serious criminal punishment without the benefit of *all* the procedural protections worked out carefully over the years and deemed fundamental to our system of justice." *Id.* at 208 (emphasis added).

One of these procedural protections is the requirement that criminal actions be prosecuted by disinterested, publicly employed attorneys. A private attorney employed to represent a client does not operate under the same restraints as a public prosecutor. Aside from his ethical obligations a privately employed attorney has the single permissible objective of forwarding his client's interests. A public prosecutor, on the other hand, must consider the public interest which lies as much in seeing justice done in every case as in the successful prosecution of any particular case. The role of federal prosecutor was eloquently described by the Supreme Court in *Berger* v. *United States,* 295 U.S. 78, 88 (1935):

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, there-

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[1] See *Bartone* v. *United States,* 375 U.S. 52, 54 (1963) (per curiam) (Both the Supreme Court and the courts of appeals have broad powers of supervision over federal proceedings.).

> fore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

These principles have been codified in the ABA Model Code of Professional Responsibility. Canon 7 of the Model Code provides, at EC7-13:

> **EC 7-13** The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused.

See also, *Professional Responsibility: Report of the Joint Conference,* 44 A.B.A.J. 1159, 1218 (1958):

> The public prosecutor cannot take as a guide for the conduct of his office the standards of an attorney appearing on behalf of an individual client. The freedom elsewhere wisely granted to a partisan advocate must be severely curtailed if the prosecutor's duties are to be properly discharged. The public prosecutor must recall that he occupies a dual role, being obligated, on the one hand, to

> furnish that adversary element essential to the informed decision of any controversy, but being possessed, on the other, of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice. Where the prosecutor is recreant to the trust implicit in his office, he undermines confidence, not only in his profession, but in government and the very ideal of justice itself.

It is too much to expect an attorney committed to his client and the client's cause to recognize the "twofold aim" referred to in *Berger* when acting as prosecutor in proceedings which, if successful, can benefit immeasurably that client and his cause. We recognize that federal prosecutors occasionally overlook their twofold obligation and become too concerned with obtaining convictions. However, this overzealousness does not have its roots in a conflict of interest. When it manifests itself the courts deal with it on a case-by-case basis as an aberration. This is quite different from approving a practice which would permit the appointment of prosecutors whose undivided loyalty is pledged to a party interested only in a conviction.

The practicality of having an attorney who is familiar with the facts of the underlying litigation involved in a criminal contempt prosecution is obvious. However, our system of justice recognizes "higher values than speed and efficiency." *Stanley* v. *Illinois,* 405 U.S. 645, 656 (1972). Where counsel for an interested party is appointed pursuant to Rule 42(b) he or she cannot conduct the criminal contempt proceedings, but may assist the United States Attorney or the assistant United States Attorney assigned to the prosecution. If the United States Attorney should decline to prosecute upon request, then the district court may appoint one or more disinterested attorneys to do so. In that event, again, counsel for an interested party may be appointed to assist. However, in this circuit an attorney for a party in underlying litigation may not conduct criminal contempt proceedings as sole or primary counsel.

The judgment of the district court is reversed, and the case is remanded for the retrial mentioned on page 3.

APPENDIX B

No 84-3332

United States Court of Appeals

FOR THE SIXTH CIRCUIT

POLO FASHIONS, INC., ET AL.,

Plaintiffs-Appellees,

v.

STOCK BUYERS INTERNATIONAL, INC.,
COLUMBUS BUSINESS SYSTEMS, INC.,
EUGENE SERGIO AND MORTON LADOWITZ,

Defendants-Appellants,

FRANK EDMUNDS, ET AL.,

Third Party Defendants

ORDER

Before: LIVELY, Chief Judge; ENGEL, Circuit Judge; and PECK, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN

John P. Hehman, Clerk

APPENDIX C

No. 84-3332

United States Court of Appeals

FOR THE SIXTH CIRCUIT

POLO FASHIONS, INC.

Plaintiff-Appellee,

v. ORDER

STOCK BUYERS INTERNATIONAL, INC., et al.,

Defendants-Appellants.

Before: LIVELY, Chief Judge; ENGEL, Circuit Judge; and PECK, Senior Circuit Judge.

Upon receipt and consideration of the petition for rehearing filed herejn by the appellants, the court concludes that the matters raised in the petition were fully considered upon the original submission of this case and that rehearing is not required. The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN,
Clerk

APPENDIX D

United States District Court

FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

POLO FASHIONS, INC.,
Plaintiff,

v.

STOCK BUYERS INTERNATIONAL, INC., *et al.*
Defendants,

CIVIL ACTION
NO. C-2-82-76
JUDGE KINNEARY

v.

FRANK EDMUNDS, *et al.*,
Third Party Defendants.

ORDER APPOINTING COUNSEL PURSUANT TO FED. R. CRIM. P. 42(b)

The plaintiff Polo Fashions Inc. ("Polo") having moved on August 9, 1983, for the issuance of civil and criminal contempt citations against defendants Stock Buyers International Inc. ("Stock Buyers"), Columbus Business Systems, Inc. ("CBS") and Eugene Sergio ("Sergio"), and against Mort Ladowitz ("Ladowitz") an officer, director and shareholder of Stock Buyers and CBS, for wilfully violating the February 3, 1982 preliminary injunction (the "injunction") in this action, and Stock Buyers, CBS, Sergio and Ladowitz having been served on August 9, 1983 with copies of all papers submitted in support of Polo's motion, and the Court having determined that there is probable cause from Polo's submissions to believe that the defendants and Ladowitz wilfully violated the provisions of the injunction; and the Court having been presented with and

considered Polo's application under Fed. R. Crim. P. 42(b) to have its counsel appointed to prosecute the criminal contempt charges; and it appearing to the Court that the charges of criminal contempt should proceed first to provide the defendants and Ladowitz with the due process and other protections available under the Constitution of the Federal Rules of Criminal Procedure, and that the appointment of Polo's counsel to prosecute the criminal contempt will facilitate an expeditious resolution of these changes since Polo's counsel is fully familiar with this matter; and

The Court having considered the Complaint and Exhibits thereto, the injunction, and Polo's application for an Order to show cause for citation for criminal and civil contempt, and the memorandum of law and affidavits and exhibits submitted in support of that application; it is

ORDERED that Polo's counsel of record in this proceeding together with Amster, Rothstein & Engelberg, 90 Park Avenue, New York, New York, and Skadden, Arps, Slate, Meagher & Flom, 919 Third Avenue, New York, New York, be and are appointed pursuant to Fed. R. Crim. P. 42(b) to prosecute the criminal contempt charges against the defendants and Ladowitz.

JOSEPH D. KINNEARY

United States District Judge

Dated: Columbus, Ohio
August 24, 1983

APPENDIX E

United States District Court

SOUTHERN DISTRICT OF OHIO

EASTERN DIVISION

POLO FASHIONS INC.,
Plaintiff,

v.

STOCK BUYERS INTERNATIONAL, INC., et al., C-2-82-76
Defendants,

v.

FRANK EDMUNDS, et al.,
Third-Party Defendants.

OPINION AND ORDER

Plaintiff in this action, Polo Fashions, Inc., an exclusive and diversified clothier, has filed this suit against numerous defendants alleging violations of the federal trademark laws. Plaintiff has requested both injunctive and monetary relief. This action is currently before the Court on numerous motions associated with the criminal contempt proceeding scheduled for hearing on December 19, 1983. Plaintiff asserts that defendants violated the provisions of the preliminary injunction issued by the Court on February 3, 1982 and, therefore, should be held in criminal contempt.

On August 24, 1983, a statement of charges was issued by this Court which worked to charge defendants with criminal contempt. The statement of charges stated that probable cause did exist to believe that the provisions of the February 3rd Injunction had been violated by defendants. Also on August

24, 1983, the Court appointed plaintiff's counsel of record, together with the firms Amster, Rothstein and Engelberg and Skadden, Arps, Slate, Meagher and Flom, pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure, to prosecute the criminal contempt charge. With respect to the statement of charges, defendants have moved to vacate on the basis that there is no probable cause to believe that the defendants acted willfully in violating this Court's Injunction. Further, on September 30, 1983, defendants filed a motion to dismiss the statement of charges because sufficient facts had not been alleged to constitute criminal contempt. With respect to this Court's order appointing special counsel, defendants have moved to vacate because the appointed counsel is too privately interested to properly prosecute the case.

CRIMINAL CONTEMPT

Rule 42 of the Federal Rules of Criminal Procedure governs criminal contempt proceedings. That Rule states, in subdivision (b), that

> [a] criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest . . .[1]

Compliance with the procedural requirements of subdivision (b) is all that is required by federal law to commence a criminal contempt proceeding. *United States v. Powers,* 629 F.2d 619, 625 (6th Cir. 1980).

[1] Subdivision (a) relates to Summary Contempt proceedings. This case does not involve subdivision (a) as the alleged contemptuous acts did not occur within the actual presence of the Court.

Because Rule 42 is the exclusive provision to which a court must look for guidance in criminal contempt proceedings, it is apparent that criminal contempt is to be viewed somewhat differently from general criminal proceedings.

> Rule 42 . . . provides that criminal contempt actions are initiated neither by indictment nor by information [although they may be], but by simple notice. The requirements of the section are less strict and technical than those of the statutes under which criminal cases are instituted. The contempt proceeding is summary in character and technical pleadings are not required.

Bullock v. United States, 265 F.2d 683 (6th Cir.), *cert. denied,* 360 U.S. 909, 932 (1959); *see also United States v. Leyva,* 513 F.2d 774, 778 (5th Cir. 1975). The major procedural requirement that this Court must look to, therefore, is not what papers are filed with the Court, but that sufficient notice was given to defendants pursuant to Rule 42(b). "The purpose of notice is to inform the contemnor of the nature of the charge and enable the contemnor to prepare a defense." *United States v. Powers, supra,* at 625. The procedural safeguards inherent within the notice requirement are sufficient to protect defendants' rights to due process.

PLAINTIFF'S MOTION TO AMEND THE STATEMENT OF CHARGES

Plaintiff has responded to defendants' two motions regarding the statement of charges by filing a motion to amend those charges. Plaintiff's motion to amend the statement of charges does not seek to add additional or different charges, but only to simplify and clarify the existing charges. The Court will begin its analysis at this point since the amended statement of charges, if allowed, will render some of the arguments upon which defendants base their motions moot.

Plaintiff seeks to amend the statement of charges in two ways. First, it wishes to delete the charge relating to defendants' sale of counterfeit IZOD shirts and, second, to explicate

the element of knowledge in the remaining charge regarding defendants' sale of counterfeit Polo shirts. The Court can think of no reason and, indeed, no reason has been proffered, why plaintiff's motion should not be granted. Since it does not serve to materially alter the substantive content of the statement of charges, it cannot work to prejudice defendants. Defendants have had sufficient notice, pursuant to Rule 42(b), at their arraignment on August 26, 1983, of the charges against them. Plaintiff's amended statement of charges does not affect that notice and, therefore, does not work to prejudice the defendants' ability to defend themselves. Plaintiff's motion to amend the statement of charges is, in the opinion of the Court, meritorious.

STATEMENT OF CHARGES

Defendants have attacked the statement of charges on numerous grounds. However, the Court does not believe that defendants' focus is correct. Given the requirements of Rule 42, it is only incumbent upon the Court to give notice to the alleged contemnors of the time and place of the hearing and the essential facts which constitute the criminal contempt charged. The Court believes, in its arraignment of defendants on August 26, 1983, with regard to the pending criminal contempt action, that it has fulfilled its procedural duty under Rule 42.

Defendants initially assert that there does not exist probable cause from which the Court can deduce that defendants acted "willfully" and that, therefore, the statement of charges is fatally defective. The Court finds this argument to be without merit. All that is required in a criminal contempt proceeding is that the pleadings rest upon information and belief. *United States v. Mine Workers,* 330 U.S. 258, 296 (1946). Certainly this requirement has been met. Plaintiffs have offered evidence, by declaration, that the shirts sold by defendants were counterfeit. They also have presented facts from which one could deduce that defendants acted with the requisite intent. Plaintiff emphasizes the method in which defendants made the sale at issue, their use of a new company to effect the sales, and the

experience defendants had in the clothing business. It is clear that plaintiff, and the Court, has sufficient facts from which it can form a belief that defendants willfully violated this Court's injunction. More importantly, however, the defendants have been "... fairly and completely apprised of the events and conduct constituting the contempt charged." *Id.* at 297.

Defendants also attack the statement of charges, in a separate motion to dismiss, by arguing that the complained of conduct does not fit within the proscriptions of this Court's injunction. Defendants further argue that plaintiff's counsel has engaged in conduct which is so egregious that it, alone, is grounds for dismissal. Defendants initially address the charge, in the original statement of charges, relating to their violation of the injunction with respect to their sale of IZOD shirts. Defendants assert that the sale of counterfeit IZOD shirts, if such occurred, is not within the proscriptions of the injunction. Plaintiff has, in its amended statement of charges, deleted the charge relating to the IZOD shirts and, therefore, defendants' argument with respect to that charge is now moot. However, the Court must proceed to consider the efficacy of defendants' other points.

Defendants' main argument supporting its motion to dismiss is that the shirts sold by them are not within the subject matter of the injunction. The Court cannot accept defendants' premise that the sale of the shirts, immediately at issue, even if they were counterfeit, was not within the proscriptions of the injunction. Defendants were specifically enjoined from selling counterfeit shirts which contained counterfeit Polo trademarks or trade names. The injunction imposed upon defendants does not discriminate between the different forms by which a party may deal in counterfeit goods. If defendants, in fact, willfully sold counterfeit Polo shirts, this Court can only conclude that it violated this Court's injunction of February 3, 1983.[2]

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[2] Defendants argue that the February 3rd injunction is so ambiguous that it may not serve as the basis for a criminal contempt prosecution. This argument has no merit. The injunction is explicit in defining what type of conduct in which defendants are proscribed

Defendants have also argued that plaintiff's counsel is guilty of prosecutorial misconduct in its allegedly overzealous prosecution of the instant action. The Court similarly finds no merit in this assertion. The Court cannot conclude, from the evidence before it, that plaintiff's counsel has mislead the Court by falsifying the facts upon which it based its information and belief that defendants willfully violated the February 3rd injunction.

APPOINTMENT OF COUNSEL

Finally, defendants have moved to vacate this Court's order appointing plaintiff's counsel to prosecute the criminal contempt action. Defendants argue that the appointment of plaintiff's counsel was inappropriate because plaintiff's counsel has a ". . . distinct private interest in the outcome of the case." It is generally recognized that Rule 42(b) of the Federal Rules

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from engaging. Defendants well know that they are enjoined, by the terms of the injunction, from dealing in counterfeit Polo merchandise. Defendants argue, however, that the injunction should ". . . describe the characteristics which would permit a purchaser to distinguish 'authorized' goods from 'counterfeits.' " This is a too stringent requirement. The methods by which an enterprising entity may manufacture counterfeit clothes are so numerous that to require a party to list all distinguishing characteristics of its product in the injunction would be unreasonable. Furthermore, it is not necessary that the party against whom the infringement was effected divulge its distinguishing characteristics in so public a fashion. This information could be extremely useful to future would-be counterfeiters.

Defendants call this Court's attention to the case *Ideal Toy Co. v. Plawner Toy Mfg. Co.*, 685 F.2d 78 (3rd Cir. 1982) to support their assertion that the injunction was demonstrably ambiguous. However, that case is easily distinguishable. In *Ideal Toy Co.*, the injunction held to be ambiguous did not adequately describe the conduct which was proscribed since it only addressed generally the commodity at issue. In the instant case, the specific conduct of selling counterfeit shirts with counterfeit Polo trademark tags attached was prohibited. In *Ideal Toy Corp.*, the commodity at issue was a toy and it conceivably could have been copied to a degree which should not be found to infringe the injunction. In the instant case, the act of selling counterfeit shirts with counterfeit Polo trademark tags attached would violate the express terms of the injunction.

of Criminal Procedure authorizes a Court to appoint private counsel to litigate, as prosecutor, a criminal contempt action.

> Neither Rule 42 nor the Due Process clause requires the court to select counsel from the staff of the United States Attorney to prosecute a criminal contempt. The practicalities of the situation—when the criminal contempt occurs outside the presence of the court but in civil litigation—require that the court be permitted to appoint counsel for the opposing party to prosecute the contempt.

Musidor, B.V. v. Great American Screen, 658 F.2d 60 (2d Cir. 1981).

It is the opinion of the Court, in the interests of the expeditious resolution of the instant criminal contempt action, that Polo Fashion's counsel should undertake to prosecute defendants.

> [T]he judge may prefer to use the attorney of a party, who will indeed ordinarily be his only means of information when the contempt is not in his presence. There is no reason why he should not do so, and every reason why he should. . . .

McCann v. *New York Stock Exchange*, 80 F.2d 211, 214 (2d Cir. 1935). In any criminal contempt action in which the moving party's counsel is appointed as the prosecuting attorney, some degree of self-serving involvement is inevitable. However, its existence does not lighten the burden of proof which the appointed attorney must meet. It must still be proven, beyond a reasonable doubt, that defendants, in fact, willfully violated the terms of the injunction imposed by this Court.

WHEREUPON, upon consideration and being duly advised, this Court determines that plaintiff's motion to amend the statement of charges is meritorious and it is, therefore, GRANTED.

FURTHER, this Court determines that defendants' motion to vacate this Court's order of August 24, 1983, finding probable cause to exist that defendants willfully violated this Court's injunction, is without merit and it is, therefore, DENIED.

FURTHER, this Court determines that defendants' motion to vacate this Court's order appointing plaintiff's counsel pursuant to Federal Rule of Criminal Procedure 42(b) is without merit and it is, therefore, DENIED.

FURTHER, this Court determines that defendants' motion to dismiss the Statement of Charges is without merit and it is, therefore, DENIED.

FURTHER, the Court determines that defendants' request for an evidentiary hearing is rendered moot by the Court's rulings.

IT IS SO ORDERED.

JOSEPH P. KINNEARY

UNITED STATES DISTRICT JUDGE

APPENDIX F

Supreme Court of the United States

No. A-128

POLO FASHIONS, INC.,
Applicant,

v.

STOCK BUYERS INTERNATIONAL INC., ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 17, 1985.

/s/ SANDRA D. O'CONNOR
Associate Justice of the Supreme
Court of the United States

Dated this 14th
day of August, 1985.

APPENDIX G

Rule 42. Criminal Contempt

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

APPENDIX H

District Court of The United States

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, ex rel PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION,

Plaintiff,

v.

ADOLPH LEDERER AND ARTHUR LEDERER CO-PARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF A. LEDERER COMPANY,

Defendants.

FILE NO. 43 C 126

ORDER APPOINTING COUNSEL

It appearing to this Court that there is good cause to believe that Arthur Lederer and Adolph Lederer, co-partners, doing business under the firm name of A. Lederer Company, 837 West Fulton Street, Chicago, Illinois, should be prosecuted by this Court for criminal contempt of this Court by reason of their disobedience of the preliminary injunction issued by this Court and entered on the 18th day of February, 1943, in the civil action entitled: *Prentiss M. Brown, Administrator, Office of Price Administration, Plaintiff, v. Adolph Lederer and Arthur Lederer, co-partners, doing business under the firm name of A. Lederer Company, Defendant,* Civil Action, File No. 43 C 126, it is hereby

ORDERED, that John F. Manierre and Robert B. Johnstone, attorneys employed by the Office of Price Administration, be

and they are hereby appointed to represent this Court in the instant matter and to prosecute on behalf of this Court the said Adolph Lederer and Arthur Lederer, co-partners, doing business under the firm name of A. Lederer Company, for criminal contempt of this Court.

BARNES
District Judge

Dated: August 23, 1943

APPENDIX I

Listing Required By Rule 28.1 of Parent Companies, Subsidiaries (Except Wholly Owned Subsidiaries) and Affiliates of Petitioner Polo Fashions, Inc.

The parent companies, subsidiaries (other than wholly owned), and affiliates of petitioner Polo Fashions, Inc. are listed below.

1. Polo Fashions, Inc. is not owned by any parent corporation.

2. Polo Clothing Co., Inc. is a subsidiary of Polo Fashions, Inc. Polo Fashions, Inc. does not have an ownership interest in any other non-wholly-owned subsidiary.

3. Polo Fashions, Inc. has no affiliates, except as set forth above.